In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 286

STATE OF ALASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This Court, on October 12, 1970, requested the parties to answer three questions:

(1) Must Congress authorize or ratify the withdrawal of territorial lands by the President?

(2) If so, did Executive Order No. 8979 have the necessary authorization or ratification? and

(3) Was this matter adequately raised below?

The United States submits the following answers:

1. It is not necessary for Congress to authorize or ratify the withdrawal of territorial lands by the President. This matter was fully considered in *United States* v. *Midwest Oil Co.*, 236 U.S. 459, where the

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Court upheld the long practice by the Executive of both temporarily withdrawing and permanently reserving parts of the public domain.[1] Consequently, congressional authorization or ratification is not necessary for the validity of Executive Order No. 8979. See, also, *One Third of the Nation's Land*, a Report to the President and to the Congress, by the Public Land Law Review Commission, 1970, pp. 43-44, 52-56.

2. Even if it be assumed, *arguendo*, that congressional authorization or ratification is required, the 1941 withdrawal was authorized by the Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141:

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

No one contends the entire area encompassed by Executive Order No. 8979, comprising approximately 2,000,000 acres, has been irrevocably and permanently withdrawn. Therefore, the withdrawal falls squarely within 43 U.S.C. 141. Furthermore, as noted in *Udall v. Tallman*, 380 U.S. 1, 10-13, Congress was fully aware of the existence of Executive Order No. 8979 as recently as the late 1950's and thus ratified it by

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[1] Including, *inter alia*, executive orders providing for Bird Reserves, 220 U.S. at 470.

the reservation contained in the Alaska Statehood Act, 72 Stat. 339, which provides, in Section 6(e), that "*such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife* * * *." [Emphasis supplied.] Clearly, the withdrawal was both authorized and ratified.

3. This matter was neither briefed nor argued in the courts below.

Respectfully submitted.

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NOVEMBER 1970.

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